UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MICHAEL W. NOYES,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 96-51-P-H***
	)	
SHIRLEY S. CHATER,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the issue of whether there is substantial evidence in the record supporting the Commissioner's determination that the plaintiff has the residual functional capacity to perform entry level sedentary jobs. I recommend that the court vacate the Commissioner's decision and remand the cause with directions to award benefits to the plaintiff.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir.

[1]This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The Commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on December 9, 1996 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

1982), the Administrative Law Judge found, in relevant part, that the plaintiff met the disability insured status requirements of the Social Security Act on the alleged date of onset of his disability and continued to do so through the date of the decision, January 9, 1995, Finding 1, Record p. 22; that he suffered from lumbar disc disease, status post laminectomy, with some S-1 nerve root scarring on the right, Finding 3, Record p. 22; that he did not suffer from an impairment or combination of impairments which meets or equals the specific criteria of any of the impairments described in the Listing of Impairments set out in 20 C.F.R. § 404, Subpart P, Appendix 1, Finding 4, Record p. 22; that he had a limited education and could not read or write well, Finding 6, Record p. 23; that his impairments limited him to the performance of sedentary work limited in turn by his need to alternate between sitting and standing periodically for relief of discomfort, Finding 7, Record p. 23; that his allegations of functional limitations in excess of those found by the Administrative Law Judge were not fully credible, Finding 8, Record p. 23; that he lacked the residual functional capacity to return to his former work, Finding 9, Record p. 23; and that, based on the testimony of a vocational expert, the plaintiff had the residual functional capacity to perform "entry level" sedentary work, specifically the jobs of information clerk, entry level inspector and checker, Finding 10, Record p. 23. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs*., 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v Secretary of Health & Human Servs*., 76 F.3d 15, 16 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support

the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Because the Commissioner determined that the plaintiff is not capable of performing his past relevant work, the burden of proof shifted to the Commissioner at Step Five of the sequential evaluation process to show the plaintiff's ability to do other work in the national economy. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence supporting the Commissioner's findings regarding both the plaintiff's residual functional capacity and the relevant vocational factors affecting his ability to perform other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health & Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

The plaintiff disputes the Commissioner's finding concerning his residual functional capacity, arguing, first, that the Administrative Law Judge was required to accept his testimony that he could not work more than six hours per day, Record p. 39, because the medical advisor present at the hearing before the Administrative Law Judge did not dispute his testimony on that point, *id*. at 43-44, and second, that the Administrative Law Judge was required to accept his testimony concerning his limited ability to concentrate, *id*. at 38. There is no medical evidence to support either of these statements by the plaintiff, and that fact alone makes it unnecessary for the Administrative Law Judge to adopt the testimony in his findings. 42 U.S.C. § 423(5)(A). The Administrative Law Judge did consider this testimony, as his hypothetical question to the vocational expert and her response make clear. Record p. 51.

The plaintiff next argues that Social Security Ruling 83-12 requires a finding of disability

when the claimant is determined to be limited to sedentary work with a sit/stand option. This is an incorrect reading of the Ruling. *See* Ruling 83-12, reprinted in *West's Social Security Reporting Service,* Rulings 1983-1991, at 38-39 (1992); *DaRosa v. Secretary of Health & Human Servs*., 803 F.2d 24, 26 (1st Cir. 1986); *Stracciolini v. Heckler,* 639 F. Supp. 548, 554 (E.D. Pa. 1986) (vocational evidence that available jobs would permit claimant to change his position from sitting to standing every thirty minutes supported Secretary's [now Commissioner's] finding of not disabled).

The Administrative Law Judge in this case specifically determined that the plaintiff did not retain the exertional capacity to perform a full range of sedentary work. Appropriately, he utilized the services of a vocational expert to determine if a significant number of suitable jobs existed given the extent of the plaintiff's exertional limitations. *See Gagnon v. Secretary of Health & Human Servs.*, 666 F.2d 662, 666 n.9 (1st Cir. 1981); Social Security Ruling 83-14, reprinted in *West's Social Security Reporting Service*, Rulings 1983-1991, at 44-45; Social Security Ruling 83-12 at 37, 38. When a claimant is unable to perform the full range of sedentary work, the Commissioner is required to produce evidence of specific jobs that a claimant can perform through the testimony of a vocational expert. In such a situation, the vocational expert should assess the effect of the claimant's limitations on the range of sedentary work; advise whether the claimant's residual functional capacity permits him to perform substantial numbers of occupations within the sedentary range; identify jobs that are within the claimant's residual functional capacity; and provide a statement of the incidence of such jobs in the regional and national economies. Social Security Ruling 83-12 at 38-39. After considering such vocational evidence, the administrative law judge must determine whether the occupational base is "significantly compromised" by the claimant's

exertional limitations. *Id*. at 38.

Here, the vocational expert first testified that there would be no jobs available for the plaintiff, based on a hypothetical posed by the Administrative Law Judge that included a younger individual with marginal reading and writing skills, sedentary work with the ability to change positions frequently, sitting no more than 45 minutes at a time. Record pp. 47-48. When the Administrative Law Judge emphasized that the question concerned "unskilled entry level type" work, the vocational expert testified that available jobs would include information clerk, electronics assembler, entry level inspector, cashier, checker II and parking lot attendant. *Id*. at 48-51. She then qualified her testimony as to the jobs of information clerk, based on the plaintiff's limited reading and writing skills, and electronics assembler, based on the sit/stand option. *Id.* at 49. She testified that 1,280 jobs as parking lot attendant were available in Maine and 2,130 jobs as information clerk. *Id*. at 51-52. When the hypothetical was modified so that the individual would not be able to "perform even at that functioning capacity on a regular basis for six to eight hours," the vocational expert testified that the plaintiff would not be "employable at a gainful activity basis." *Id.* at 51. The Administrative Law Judge found that the plaintiff could perform the jobs of information clerk, entry level inspector and checker. *Id*. at 23.

The plaintiff contends that the Commissioner has failed to carry her burden at Step Five because each of these three jobs has a Specific Vocational Preparation level of 3 or above in the *Dictionary of Occupational Titles* ("*DOT*") (U. S. Dep't of Labor, 4th ed. rev. 1991). A Specific Vocational Preparation level of 3 requires training over one month and up to three months. 20 C.F.R. §§ 404.1568(a) and 416.968(a) state that unskilled work is "work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. . . . [W]e

consider jobs unskilled if . . . a person can usually learn to do the job in 30 days." Therefore, the plaintiff asserts, none of the jobs listed by the Administrative Law Judge are unskilled, each requires transferable skills, and since the vocational expert testified that the plaintiff had no transferable skills, remand is required.

The plaintiff also asserts that the three listed jobs have language development levels listed in the DOT of 2 or above, and the finding that he cannot read or write well puts the jobs beyond his capacity. The job of information clerk has a language development level of three, which requires ability to read novels, magazines, and atlases, and to write reports and essays. Even without the reservations expressed by the vocational expert concerning the plaintiff's ability to work as an information clerk, there is no substantial evidence in the record to support a finding that the plaintiff is capable of meeting such requirements. However, the remaining two jobs have a language development level of 2, which requires ability to read adventure stories and comic books, look up words in the dictionary, and read instructions for assembling model cars and airplanes. The plaintiff testified that he puts model cars together. Record p. 38. Thus, the record supports a finding that, from a language development point of view, the plaintiff can perform the jobs of checker and entry level inspector.

Several cases in the First Circuit have addressed the situation where a plaintiff must alternate sitting and standing. "[A] determination that a claimant is able to perform sedentary work 'must be predicated upon a finding that the claimant can sit most of the day, with occasional interruptions of short duration.'" *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293 (1st Cir. 1986) (citations omitted). Thus, someone who cannot remain seated "most of the day" and who must "often interrupt [his] sitting with standing for significant periods of time" is not capable of sedentary

work as defined by the Commissioner. *Thomas v. Secretary of Health & Human Servs.*, 659 F.2d 8, 10-11 (1st Cir. 1981). There is no evidence in this record concerning the length of time the plaintiff must stand after 45 minutes of sitting before he may sit again; therefore, it is impossible to conclude whether the plaintiff would need to stand for "significant periods of time." The burden is on the Commissioner at Step Five, but neither the Administrative Law Judge nor the vocational expert obtained this information.

Consideration of the *DOT* also exposes a lack of support in the evidence for the Administrative Law Judge's conclusion. There is at least a rebuttable presumption in favor of the *DOT* classifications. *Montgomery v. Chater*, 69 F.3d 273, 276-77 (8th Cir. 1995); *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995). If the vocational expert provides detailed expert testimony that particular jobs fall within the plaintiff's residual functional capacity, the presumption will be rebutted. Only then will it be necessary to consider whether the *DOT* classifications control outright, as other circuits have held. *Tom v. Heckler*, 779 F.2d 1250, 1255-56 (7th Cir. 1985); *Mimms v. Heckler*, 750 F.2d 180, 186 (2d Cir. 1984). We need not decide that issue here, because the evidence in the record is not sufficient to rebut the presumption.

Here, the vocational expert did not testify that the job traits of the positions of entry level inspector or checker varied from the way the *DOT* described them. *Montgomery*, 69 F.3d at 276-77. In any event, in order for jobs to be classified as unskilled, they must require training time of less than 30 days. *Terry v. Sullivan*, 903 F.2d 1273, 1277 (9th Cir. 1990). Jobs that are by the regulatory definitions not unskilled cannot be used as the basis for finding work available in the national economy for a claimant who is found by the Administrative Law Judge to be capable of only unskilled work. In addition, the vocational expert did not testify concerning the national, regional,

or local job market for checkers. This lack of testimony from the vocational expert concerning the actual availability of one of the jobs upon which the Administrative Law Judge relied in either the national or the local economy, like the lack of testimony from the vocational expert concerning any reason why the limiting factors in the *DOT* descriptions of those jobs did not apply to the plaintiff, creates a deficiency in the evidence requiring remand.

The plaintiff has requested remand with an order for payment of benefits. Itemized Statement of Errors Pursuant to Local Rule 26 Submitted by Plaintiff (Docket No. 3) at 6. The Commissioner had a full and fair opportunity to develop the record and meet her burden at Step 5. The Social Security Act authorizes the court to enter a judgment "affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). The court may "at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." *Id.* As the Second Circuit noted more than a decade ago, Congress added this language to the Social Security Act in 1980 as a "mandate to foreshorten the often painfully slow process by which disability determinations are made." *Carroll v. Secretary of Health & Human Servs.*, 705 F.2d 638, 644 (2d Cir. 1983). To remand for further proceedings in these circumstances would be to countenance the notion that the Commissioner may have as many chances as she needs, *ad infinitum*, to meet her burden at Step 5. Such a possibility cannot be what Congress envisioned in light of the quoted language from section 405(g). A claimant who seeks disability benefits from the Social Security Administration, and then does all that is expected of him pursuant to the sequential evaluation process, deserves an answer from the system. In circumstances where the

claimant has made out a prima facie case for benefits and the Commissioner's vocational expert does not present the required evidence of the claimant's ability to perform work that exists in the national economy, the appropriate relief is an award of benefits absent some good cause for the evidentiary gap.

Finding no such cause, I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** with directions to award benefits to the plaintiff.[2]

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 17th day of December, 1996.

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David M. Cohen
United States Magistrate Judge

[2] Accordingly, I need not consider the plaintiff's further argument that the Administrative Law Judge failed to consider the physical limitations included in the report of Ronald S. Jolda, D.O., who evaluated the plaintiff's back pain as a consultant for the state of Maine.